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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91206212
Party	Defendant entrotech, inc.
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Submission	Opposition/Response to Motion
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Signature	/Erin M. Hickey/
Date	04/01/2015
Attachments	Opposition to CF Motion to Extend & Declaration of Erin Hickey ISO MTE with Exhibits.pdf(3476478 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of application Serial Nos.:

85/499,349 for the mark **CHLORADERM**
85/499,345 for the mark **CHLORABSORB**
85/499,337 for the mark **CHLORABOND**
85/499,332 for the mark **CHLORADRAPE**

Filed on December 19, 2011
Published in the *Official Gazette* on May 29, 2012

CAREFUSION 2200, INC., *Opposer*, v. ENTROTECH LIFE SCIENCES, INC., *Applicant*.	Combined Opposition Proceeding No.: 91-206,212

United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

APPLICANT'S OPPOSITION TO OPPOSER'S UNCONSENTED MOTION TO SUSPEND OR EXTEND ITS TESTIMONY PERIOD TO TAKE THE TESTIMONY DEPOSITION OF DR. JOHN S. FOOR, M.D.

Applicant Entrotech Life Sciences, Inc. ("Applicant") respectfully requests that the Motion to Suspend or Extend Opposer's Testimony Period for Purposes of Taking the Testimony Deposition of Dr. John S. Foor, M.D. (the "Motion to Extend") filed by CareFusion 2200, Inc. ("Opposer") be denied. Indeed, Opposer's Motion to Extend is nothing but a last-minute attempt to rectify Opposer's procedural missteps for mistakenly assuming that Applicant would agree to stipulate to Opposer submitting the discovery deposition of a non-party witness, Dr. John S.

Foor, M.D. ("Dr. Foor"), under a Notice of Reliance when Applicant's counsel never had the opportunity to cross examine the witness, and for failing to give Dr. Foor reasonable notice of Opposer's intent to take his testimony deposition and to comply with such a request during its testimony period.

BACKGROUND

On June 17, 2014, Opposer took almost seven hours of fact deposition testimony from Dr. Foor. When Opposer served its pre-trial disclosures on Applicant nearly nine months later, Opposer listed Dr. Foor – along with three other possible witnesses from Opposer's company – as a possible witness from whom it "may" seek testimony during its testimony period, which closed March 22, 2015. However, as this Trademark Trial and Appeal Board (the "Board") is aware the pre-trial disclosure of a potential witness does not serve as a substitute for issuing a proper notice of the taking of an actual testimony deposition. *See* 37 C.F.R. § 2.123(c). On February 12, 2015, Opposer served Applicant with Notices for Testimony Depositions for the three witnesses from Opposer's company. Noticeably absent, however, was a Notice for Testimony Deposition of Dr. Foor.

Counsel for both Opposer and Applicant spent the remainder of February coordinating the dates and travel arrangements for the three noticed testimony depositions, including changes to the scheduled deposition dates by Opposer, which Applicant's counsel had accommodated. Never once during these exchanges did counsel for Opposer ever advise undersigned counsel that Opposer intended to also take the testimony deposition of Dr. Foor. On March 2, 2015, Opposer served Applicant with amended Testimony Notices for now only two of Opposer's witnesses. The very next day, Opposer's counsel asked undersigned counsel to stipulate to Opposer submitting Dr. Foor's discovery deposition as evidence under a Notice of Reliance,

which, absent Applicant's consent, would not be proper under the Trademark Rules of Practice, given that Dr. Foor is not a party to the opposition nor was he an officer, director, managing agent, or person designated to testify as a corporate representative on behalf of Applicant when Opposer's counsel deposed him. *See* 37 C.F.R § 2.120(j). As a result, the only way Dr. Foor's discovery deposition could properly be offered into evidence is if the parties stipulated to it; if Opposer established a showing of exceptional circumstances for allowing the discovery deposition to be in evidence; or if Dr. Foor was dead during the testimony period, outside of the United States, unable to testify because of age, illness, infirmity, or imprisonment, or could not be served with a subpoena to compel attendance at a testimonial deposition, all of which would require the Board's approval. *Id.*

Undersigned counsel declined to stipulate to Opposer's submission of Dr. Foor's discovery deposition as evidence, given she did not have the opportunity to cross-examine Dr. Foor during his discovery deposition, on March 4, 2015. The next day, without Applicant's consent, Opposer unilaterally (and improperly) submitted Dr. Foor's discovery deposition under a Notice of Reliance and simultaneously served a procedurally defective subpoena upon Dr. Foor for his testimony in Columbus, Ohio on March 19, 2015, which was not served upon undersigned counsel until March 6, 2015. Annexed hereto as **Exhibit A** to the Declaration of Erin M. Hickey, Esq. (the "Decl. of Erin M. Hickey, Esq.") is a true and correct copy of the e-mail exchange between undersigned counsel and counsel for Opposer between March 3-6, 2015 regarding Opposer's submission of Dr. Foor's discovery deposition as evidence under a Notice of Reliance, issuance of a subpoena for his testimony deposition, and undersigned counsel's objections to same. By way of background, the testimony depositions of Opposer's own two witnesses, which Opposer noticed as early as February 12, 2015, took place the week of March

9, 2015 in Chicago, Illinois, with undersigned counsel flying to Chicago, Illinois from San Diego, California on Wednesday, March 11, 2015 for depositions on March 12-13, 2015.

On March 11, 2015, Applicant filed a Motion to Quash or, in the alternative, to modify the procedurally defective subpoena issued by Opposer ("Motion to Quash") in the United States District Court for the Southern District of Ohio. In addition to moving to quash the subpoena because it was procedurally defective, Applicant also moved to quash it because it did not give reasonable notice for Dr. Foor, a busy, well-respected vascular surgeon, to comply and was also unduly burdensome to Dr. Foor, his schedule, and his patients.

The very next evening, after reviewing Applicant's Motion to Quash and likely recognizing that the subpoena served on Dr. Foor was procedurally defective, Opposer's counsel served by hand a Notice for Testimony Deposition of Dr. Foor to undersigned counsel after the deposition of Mr. Creidenberg ended, which again demanded his testimony on the same day the first subpoena had demanded his testimony – March 19, 2015. *See* Decl. of Erin M. Hickey, Esq. at ¶ 2. Importantly, and contrary to Opposer's claim in footnote 1 in the Motion to Extend[1], counsel discussed – that evening, after the deposition of Opposer's witness had ended – the Notice for Testimony Deposition and their respective positions with respect to the issues of Dr. Foor's discovery and testimony depositions, including Opposer filing the Motion to Extend with the Board if Applicant did not stipulate to the admission of Dr. Foor's discovery deposition. At that time, undersigned counsel advised Opposer's counsel that she needed to consult with Applicant about the issues and would respond the following Monday. Counsel for Opposer again informed undersigned counsel of her intent to file the Motion to Extend with the Board should Applicant not stipulate to the admission of Dr. Foor's deposition testimony in an e-mail on Monday, March 16, 2015. Undersigned counsel responded to counsel for Opposer that same

[1] Motion to Extend at 1, fn. 1 (Note: Opposer's Motion to Extend does not contain page numbers).

evening to advise that Applicant would not agree to stipulate. Annexed hereto as **Exhibit B** to the Decl. of Erin M. Hickey, Esq. is a true and correct copy of the e-mail exchange between counsel for Opposer and undersigned counsel on March 16, 2015 relating to the instant Motion to Extend and whether Applicant would stipulate to the admission of Dr. Foor's discovery deposition.

Acknowledging its first subpoena was procedurally defective, Opposer issued a second subpoena for Dr. Foor's testimony deposition on March 17, 2015 – now with only five days left in its trial period. Applicant, again, sought to quash the second subpoena, which is currently pending before the United States District Court for the Southern District of Ohio, on grounds the subpoena did not give Dr. Foor reasonable time to comply and is unduly burdensome. Annexed hereto as **Exhibit C** to the Decl. of Erin M. Hickey, Esq. are true and correct copies of Dr. Foor's Motion to Quash or, in the alternative, to modify the second improper subpoena issued by Opposer and its supporting exhibits. On the same day, realizing that its trial period was quickly closing, Opposer filed its Motion to Extend its testimony period.

LEGAL STANDARD

A motion to extend the testimony period may only be granted upon a showing of good cause. *See* Fed. R. Civ. P. 6; TBMP § 509. The party moving for an extension bears the burden of proof, and must "state with particularity the grounds therefor, including detailed facts constituting good cause." *Luemme Inc. v. D.B. Plus Inc.*, 53 U.S.P.Q.2d 1758, 1760 (T.T.A.B. 1999).

> Moreover, **a party moving to extend time must demonstrate that the request extension of time is not necessitated by the party's own lack of diligence of unreasonable delay in taking the required action during the time previously allotted therefor**. The Board will "scrutinize carefully" any motion to extend time, to determine whether the requisite good cause has been shown.

T.B.M.P. § 509.01(a).

If a party cannot adequately state grounds for good cause for its inaction, a motion to extend must be denied. *See* Fed. R. Civ. P. 6(b); *Fairline Boats PLC v. The New Howmar Boats Corp.* 59 U.S.P.Q.2d (T.T.A.B. 2000) (motion to extend testimony period denied wherein movant's sparse motion sought an extension to take the testimony of two witnesses and waited until the end of movant's testimony period to seek an extension); *Baron Philippe de Rothschild S.A. v. Style-Rite Optical Mfg. Co.*, 55 U.S.P.Q.2d 1848, 1851 (T.T.A.B. 2000) (motion to extend discovery denied when counsel was aware of witness' unavailability, but waited until the last day of the discovery period to seek an extension); *Adams & Brooks, Inc. v. Morris National, Inc.*, Cancellation No. 92052158, 2011 WL 11071330, at *2-3 (T.T.A.B. June 21, 2011) (denying motion to extend as merely arguing that an extension is needed to resolve disputes regarding alleged deficient discovery responses do not constitute factual circumstances to support an extension of discovery period); *Johnston Pump/General Valve Inc. v. Chromalloy American Corp*., 13 U.S.P.Q.2d 1719, 1720 n. 3 (TTAB 1989) ("The presentation of one's arguments and authority should be presented thoroughly in the motion or the opposition brief thereto."). Among these grounds, "[c]ursory or conclusory allegations that are denied unequivocally by the non-movant, and that are not otherwise supported by the record, will not constitute a showing of good cause." *Cf. Instruments SA Inc. v. ASI Instruments Inc.*, 53 U.S.P.Q.2d 1925, 1927 (T.TA.B. 1999).

ARGUMENT

Opposer's Motion to Extend is an unreasonable attempt to make up for its procedural missteps with respect to Dr. Foor's testimony and does not constitute good cause for extending

its testimony period. Had Opposer acted diligently, it would have known since it originally took Dr. Foor's deposition that his discovery deposition would be inadmissible at this stage, and could have taken steps to handle his testimony during its trial period differently. Indeed, Opposer could have asked undersigned counsel to treat Dr. Foor's discovery deposition as a testimony deposition at the time, when she could have prepared to cross examine him, and not just assumed she would agree to stipulate to the admission of his discovery deposition without having cross examined him. Alternatively, Opposer could have just noticed the deposition when it noticed its other witnesses and given Dr. Foor reasonable notice that he would have to testify again. Either way, counsel for Opposer could have avoided the present motion and district court action entirely. Failing to take either action does not constitute good cause to extend or suspend its testimony period to take Dr. Foor's testimony deposition after its testimony period has expired. *See Jodi Krostopher Inc. v. International Seaway Trading Corp.*, 91 U.S.P.Q.2d 1957 (T.T.A.B. 2009) (failure to take testimony during testimony period without explanation for failure to do so does not constitute good cause – motion to suspend denied). It was only when Applicant refused to stipulate to admit Dr. Foor's discovery deposition as evidence did Opposer feel the sudden need to seek the testimony deposition of Dr. Foor.

Opposer's submission of Dr. Foor's fact deposition under a Notice of Reliance under 37 C.F.R. § 2.120(j) is invalid, and Applicant will be separately moving to strike the discovery deposition under this Notice of Reliance. Opposer's two subpoenas and present motion are evidence that it knows such a submission was improper, and it is now trying to claim that it acted diligently and reasonably in trying to secure Dr. Foor's testimony. Dr. Foor should not suffer the consequences of an extension only to remedy the missteps of Opposer, and Applicant should not be forced to stipulate to the entry of his previous testimony into evidence without having had the

opportunity to exercise its right to cross-examine him, or be forced to incur the expenses and time of defending a duplicative deposition. Indeed, the information sought from Dr. Foor, as identified in Opposer's pre-trial disclosures, is available from its own witnesses and documents produced in this matter. The prejudice to Dr. Foor far outweighs any probative value to Opposer.

Opposer's actions with respect to Dr. Foor's testimony are negligent, and its sparse Motion to Extend does not state any legitimate, "good cause" reasons to excuse such negligence. Opposer's actions, notably omitted from its Motion, cannot support that it still had good cause to petition the Board for an extension of time in which to take Dr. Foor's deposition. *See Intel Corporation v. Steven Emeny*, Opposition No. 91123312, 2005 WL 2249741, at *2 (T.T.A.B. Aug. 31, 2005) (movants sparse motion to extend testimony period denied where it contained very little information). Requiring Dr. Foor, a non-party witness, to be deposed yet again unduly burdens him and his patients. Unnecessary last-minute cancellations of appointments and procedures endangers his patients' lives, puts his reputation as a vascular surgeon at stake, and burdens his already booked schedule. Tellingly, Opposer offers no explanation regarding its alleged good cause to extend, but instead, just claims that Opposer's Motion to Extend is "for the sole purpose of permitting Opposer to conduct a testimony deposition of Dr. Foor in the event that the motion to quash the subpoena for Dr. Foor to testify is denied."[2]

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that Opposer's Motion to Extend be denied.

[2] Motion to Extend at 2.

Respectfully submitted,

Date: April 1, 2015

/s/ Erin M. Hickey

Lisa M. Martens
Erin M. Hickey
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Telephone: (858) 678-5070
Facsimile: (858) 678-5099

Attorneys for Applicant,
ENTROTECH LIFE SCIENCES, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document has this 1st day of April, 2015 been mailed by electronic mail, as agreed to by counsel for the parties, to Opposer's counsel of record:

Joseph R. Dreitler, Esq.
Mary R. True, Esq.
DREITLER TRUE, LLC
jdreitler@ustrademarklawyer.com
mtrue@ustrademarklawyer.com

/s/ April R. Morris
April R. Morris

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of application Serial Nos.:

85/499,349 for the mark **CHLORADERM**
85/499,345 for the mark **CHLORABSORB**
85/499,337 for the mark **CHLORABOND**
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Filed on December 19, 2011
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CAREFUSION 2200, INC., *Opposer*, v. ENTROTECH LIFE SCIENCES, INC., *Applicant*.	Combined Opposition Proceeding No.: 91-206,212

DECLARATION OF ERIN M. HICKEY, ESQ.

I, Erin M. Hickey, hereby declare and state as follows:

1. I am a Principal with the law firm of Fish & Richardson P.C., which represents Applicant Entrotech Life Sciences, Inc. ("Applicant") in this proceeding. I am duly licensed to practice law in the states of California and New York, and am authorized to practice before the Trademark Trial and Appeal Board of the United States Patent and Trademark Office. I have personal knowledge of the facts stated in this declaration and can and would testify truthfully thereto if called upon to do so.

2. On the evening of March 12, 2015, after the conclusion of the testimony deposition of Mr. Jan Creidenberg, counsel for Opposer, Mary R. True, Esq., served to me, by hand, a Notice of Testimony Deposition of Dr. John S. Foor, M.D. for March 19, 2015.

3. After Ms. True served me with a Notice of Testimony Deposition of Dr. Foor, we discussed – also that evening – the Notice for Testimony Deposition and our respective positions with respect to the issues of Dr. Foor's discovery and testimony depositions, including Opposer filing a Motion to Extend with the Trademark Trial and Appeal Board if Applicant did not stipulate to the admission of Dr. Foor's discovery deposition, and I advised counsel that I would consult with Applicant regarding the issues and respond by Monday, March 16, 2015.

4. Annexed hereto as **Exhibit A** is a true and correct copy of the e-mail exchange between undersigned counsel and counsel for Opposer between March 3-6, 2015 regarding Opposer's submission of Dr. Foor's discovery deposition as evidence under a Notice of Reliance, Opposer's subpoena to Dr. Foor for the taking of his testimony deposition, and undersigned counsel's objections to same.

5. Annexed hereto as **Exhibit B** is a true and correct copy of the e-mail exchange between counsel for Opposer and undersigned counsel on March 16, 2015 relating to Opposer's Motion to Extend and whether Applicant would stipulate to the admission of Dr. Foor's discovery deposition.

6. Annexed hereto as **Exhibit C** are true and correct copies of Dr. John S. Foor, M.D.'s Motion to Quash or, in the alternative, to modify the second improper subpoena issued by Opposer and its supporting exhibits.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my personal knowledge and understanding.

Dated: April 1, 2015

Respectfully submitted,

FISH & RICHARDSON P.C.

/s/ Erin M. Hickey
Erin M. Hickey
Attorney for Applicant,
ENTROTECH LIFE SCIENCES, INC.

EXHIBIT A

Nancy Ly

From: Erin Hickey
Sent: Friday, March 06, 2015 2:56 PM
To: Mary True (mtrue@ustrademarklawyer.com)
Cc: jdreitler@ustrademarklawyer.com; Tom Trofino; Elizabeth Brenckman; Katherine Reardon
Subject: RE: Foor Discovery Deposition

Hi Mary,

You have (a) filed Dr. Foor's discovery deposition under a Notice of Reliance, apparently believing you can rely upon Rule 704.09(1) to do so, and (b) also issued a subpoena for Dr. Foor to testify as a witness during the last week you have available in your client's testimony period. If you believe your reliance on Rule 704.09(1) is valid, then it seems quite duplicative (not to mention, unduly burdensome) to also take his testimony deposition, doesn't it?

Most likely, you have issued the subpoena as "insurance" because you are well aware that your reliance on Rule 704.09(1) to have his discovery deposition admitted under a Notice of Reliance is wildly misplaced – both on the facts, and on the law. Having deposed Dr. Foor for nearly seven hours last June, it should be very clear to you that he has ***never*** acted as an officer (or, for that matter, with any title giving him authority to bind the current Applicant, Entrotech Life Sciences, Inc. or Entrotech, Inc., who originally applied to register the marks at issue) at any time, period. Moreover, Rule 704.09(1), which you have relied upon in submitting his discovery deposition under a Notice of Reliance, provides the following:

"*The discovery deposition of a party or of anyone who **at the time of taking the deposition** was an officer, director[,] or managing agent of a party, or a person designated by a party pursuant to Rule 30(b)(6) or Rule 31(a) of the Federal Rules of Civil Procedure, may be offered in evidence by an adverse party*."

Even assuming, for argument's sake, that Dr. Foor somehow was an officer of Entrotech, Inc. (or Entrotech Life Sciences, Inc.) "at the time the applications [and here, I assume you mean my client's applications] were filed," which he wasn't, that wouldn't even matter. Plainly, to be admissible under Rule 704.09(1), Dr. Foor would have had to have held the position of an "officer" **on the day you deposed him**, which he didn't. To be clear, Dr. Foor has never held the position of an officer and has never held any title giving him authority to bind Entrotech Life Sciences, Inc. or Entrotech, Inc. ever, much less on June 17, 2014 when you deposed him. Given that you've already submitted his discovery deposition under a Notice of Reliance under this Rule, we will be objecting to its admissibility and moving to strike it, in its entirety, your exhibits included.

As for the subpoena you just issued today, demanding that Dr. Foor appear as a non-party, adverse witness for your client the week of March 16th, rest assured that we'll be moving to quash it. Not only have you given us unreasonable notice under the circumstances, but you are subjecting Dr. Foor to an undue burden. If you recall, the following timeline transpired from February 5, 2015 through today:

- **February 5, 2015** – You served us with your client's pre-trial disclosures, which listed three witnesses from CF who "may" testify, along with Dr. Foor who, likewise, "may" testify. As surely you're aware, the pre-trial disclosure of any witness, much less a potential one, "does not substitute for issuance of a proper notice of examination" under the Trademark Rules of Practice. In the same e-mail, you also advised that you "will be sending out the Testimony Notices early next week. FYI, the CFN witnesses will give their testimony in Chicago the week of March 16." You never mentioned a Testimony Notice of Dr. Foor or that you would be intending to have him testify during your testimony period.

- **February 12, 2015** – Late that week, not early as you had advised, you served us with Testimony Notices for the three witnesses from CF. Again, you did not serve us with a Testimony Notice for Dr. Foor, or mention him at all, much less that you would be serving a Testimony Notice for him, period.

- **February 17, 2015** – I e-mailed you, alerting you to the fact that I had just been confirmed as a speaker for a large-scale event in Austin, Texas for the week of March 16th, and asked if we could re-schedule your witnesses' testimony for the week before.

- **February 18, 2015** –You responded to my e-mail, advising that you couldn't re-schedule them, claiming: I'm sorry, but the week of the 16th is the only week during the testimony period that all the witnesses were available. If you had let me know sooner that that week was a problem, perhaps we could have factored that in. But their calendars are set for the next month and can't be rescheduled." I advised you later that day that I had just learned the specific dates for the speaking event; that I had advised you as early as possible; and I even offered to extend your testimony period, if necessary.

- **February 19, 2015** – According to you, your client "said they are unable to reschedule."

- **February 23, 2015** – As a result, I cancelled my speaking engagement, as well as my travel accommodations, in light of your client's inability to re-schedule, and advised you that I would be attending the week of the 16th.

- **February 25, 2015** – Two days after I cancelled my other commitment, you e-mailed me, and suddenly, your client is now available to re-schedule to the week before, and can no longer be available the week of the 16th. Instead, they will be "available March 11-13."

- **February 26, 2015** – I asked you to confirm that your testimony depositions will be occurring March 11-13, such that I could cancel yet more flights and re-book, and you confirmed. I re-booked my speaking engagement, and paid a hefty price for airfare and attendance fees. I booked my airfare for March 10, to be present the day before the depositions, which you confirmed would be held "on 3/11 through 3/13. Maybe all three days, maybe just Weds and Friday."

- **March 2, 2015** – You served with me amended Testimony Notices for now only two witnesses, and now not until March 12. As a result, I had to re-book my flights again so that I wouldn't have to be there an extra day (and unnecessarily incur additional hotel costs for my client).

- **March 3, 2015** – For the first time, you mentioned Dr. Foor, asking me to stipulate to your submitting his discovery deposition as evidence under a Notice of Reliance.

- **March 4, 2015** – I declined to stipulate to this, given that I didn't have the opportunity to cross examine him then, nor did I have any idea you intended to use his deposition for this purpose –essentially, as a testimony deposition. As a courtesy, I advised you that Dr. Foor wasn't available over at least the next two weeks, given his busy schedule as a vascular surgeon. You claimed you could submit his discovery deposition properly under a Notice of Reliance, but also advised that you will issue a subpoena for his deposition.

- **March 5, 2015** – You submitted his discovery depositon under a Notice of Reliance.

- **March 6, 2015** – You issued a subpoena for Dr. Foor's testimony.

You could have noticed Dr. Foor's testimony deposition when you noticed the others, but you didn't –very likely because you didn't think you had to do it, and that you could just rely on his discovery deposition, which you realized, too late in the game, wasn't the case under the Trademark Rules of Practice. Forcing Dr. Foor to cancel appointments that he has had booked for weeks, likely months now, for important, surgical procedures, at the last minute – indeed, for the last week you have left in your testimony period – will prejudice him (and his patients) greatly. Not to mention, he is a non-

party, adverse witness, ***who you already deposed for nearly seven hours***. You could have asked me in June if I would stipulate to his deposition as a testimony deposition, and I could have cross examined him at that point, to spare him the unnecessary time of a duplicative testimony deposition, and to spare my client's resources in forcing me to fly to Ohio, yet again. Not to mention, whatever information you allegedly "need" from Dr. Foor you should be able to get from your own clients.

Your lack of professional courtesy for Dr. Foor's schedule, as well as mine, are not well taken and your aggressive actions towards him are harassing. As a reminder, we represent Dr. Foor for the purposes of any testimony during this proceeding, so please refrain from contacting him directly.

Erin

From: Mary True [mailto:mtrue@ustrademarklawyer.com]
Sent: Wednesday, March 04, 2015 12:48 PM
To: Erin Hickey
Cc: Joseph Dreitler; Tom Trofino
Subject: RE: Foor Discovery Deposition

Erin –

It is our understanding that because Dr. Foor was an officer of Applicant at the time the applications were filed, his discovery deposition can be submitted under Rule 704.09(1). We will be doing so this week. However, given your objections, we will also issue a subpoena for his deposition in Columbus during the week of March 16.

Mary

From: Erin Hickey [mailto:Hickey@fr.com]
Sent: Wednesday, March 04, 2015 3:33 PM
To: Mary True
Cc: Joseph Dreitler; Tom Trofino
Subject: RE: Foor Discovery Deposition

Hi Mary,

I can't agree to stipulate that you can submit Dr. Foor's discovery deposition under a Notice of Reliance, given that I did not have an opportunity to cross examine him during his discovery deposition nor was I aware that you would later try to submit his discovery deposition under a Notice of Reliance (essentially, as a testimony deposition) during your client's testimony period. Also, I checked with Dr. Foor, and he is unavailable for at least the next two weeks, given his busy schedule as a vascular surgeon.

Erin

From: Mary True [mailto:mtrue@ustrademarklawyer.com]
Sent: Tuesday, March 03, 2015 8:53 AM
To: Erin Hickey
Cc: Joseph Dreitler; Tom Trofino
Subject: Foor Discovery Deposition

Erin –

Would you agree to stipulate that we can submit Dr. Foor's discovery deposition under a Notice of Reliance? Otherwise, we will need to take his testimony during the testimony period. Should we work through you to get that scheduled?

Mary

Mary R True
DREITLER TRUE LLC
19 E. KOSSUTH ST
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614.449.6677
614.449.6642(direct)
513.404.5875(cell)
mtrue@ustrademarklawyer.com

EXHIBIT B

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CareFusion 2200, Inc.	)	Case No. 2:15-mc-00016
	)	
Plaintiff,	)	(Pending Before T.T.A.B. In Trademark Opposition No. 91-206,212)
	)	
v.	)	
	)	Judge Edmund A. Sargus
Entrotech Life Sciences, Inc.	)	
	)	Magistrate Judge Norah McCann King
Defendants.	)	
	)	
	)	

DR. JOHN S. FOOR, M.D.'S MOTION TO QUASH OR, IN THE ALTERNATIVE, TO MODIFY THE SECOND IMPROPER SUBPOENA ISSUED BY CAREFUSION 2200, INC.

Dr. John S. Foor, M.D. ("Dr. Foor"), a non-party to the underlying Trademark Opposition pending before the Trademark Trial and Appeal Board, hereby moves the Court for an Order quashing the second improper subpoena served by CareFusion 2200, Inc. on March 17, 2015 which purports to demand attendance on March 23, 2015. The reasons for this Motion are set forth more fully in the attached Memorandum in Support. A copy of the subpoena is attached as Exhibit 2.

Respectfully submitted,

/s/ Timothy R. Bricker
Timothy R. Bricker (0061872)
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280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215Telephone: (614) 365-4100
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Trial Attorney for Dr. John S. Foor, M.D.

Of Counsel:

Michael H. Carpenter (0015733)
Caitlin E. Murphy (0090665)
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MEMORANDUM OF LAW IN SUPPORT OF DR. JOHN S. FOOR, M.D.'S MOTION TO QUASH OR, IN THE ALTERNATIVE, TO MODIFY THE SECOND IMPROPER SUBPOENA ISSUED BY CAREFUSION 2200, INC.

Dr. John S. Foor, M.D. is a respected vascular surgeon with an active practice and surgery schedule located in Central Ohio. On Friday, March 5, 2015, a subpoena requiring that he appear for a deposition on March 19, 2015 was left with a receptionist.[1] Dr. Foor subsequently moved to quash the subpoena on the grounds that it was procedurally deficient, unduly burdensome, and failed to provide reasonable notice, as explained more fully below. The subpoena was served by CareFusion 2200, Inc. ("CareFusion"), and relates to a trademark opposition action currently pending before the Trademark Trial and Appeal Board ("T.T.A.B.") of the United States Patent and Trademark Office captioned *CareFusion 2200, Inc. v. Entrotech Life Sciences, Inc.*, Trademark Opposition No. 91-206,212. Recognizing its original subpoena was not enforceable, CareFusion has now had a second improper subpoena issued to Dr. Foor and served upon him on March 17, 2015.[2] This second subpoena purports to demand Dr. Foor's appearance for deposition on Monday, March 23, 2015 at 9:00 a.m., *i.e.*, first thing in the morning on the fourth business day after he was served.

Dr. Foor now moves to quash the second subpoena, or, in the alternative, to have it modified. In particular, Dr. Foor moves to quash the subpoena because it fails to allow a reasonable time to comply, imposes an undue burden on him, and, seeks only duplicative testimony already taken during a nearly seven-hour deposition which occurred almost nine months ago. *See* Ex. 3, Decl. of Dr. Foor at ¶¶ 4-6. The subpoena is particularly improper because CareFusion and its counsel have been aware since at least March 5, 2015, that Dr. Foor is unavailable for a deposition for the remainder of the testimony period due his demanding

[1] A copy of the March 5, 2015 subpoena and service affidavit is attached as Exhibit 1.
[2] A copy of the March 17, 2015 subpoena and service affidavit is attached as Exhibit 2.

schedule as a vascular surgeon, including a schedule of patient visits and procedures, and administrative appointments. *See id.* at ¶¶ 5-6.

For purposes of any testimony Dr. Foor provides as part of the T.T.A.B. matter, (whether discovery deposition testimony or trial testimony), Dr. Foor is represented by counsel for Entrotech Life Sciences, Inc. ("Entrotech"), and has signed an engagement letter memorializing this understanding. Counsel for CareFusion is aware that counsel for Entrotech represents Dr. Foor for these purposes. Counsel for Entrotech lives and works in San Diego, California. Thus, counsel for Dr. Foor and Entrotech will be unable to adequately prepare and, if the deposition proceeds, will have had only three business days to: (1) return to her home in San Diego, California from a professional commitment in Austin, Texas; (2) fly to Columbus, Ohio from San Diego, California and review materials in order to competently prepare to defend Dr. Foor's trial testimony deposition (which is akin to the trial testimony of a non-party, adverse witness, as explained further below); (3) meet with Dr. Foor to prepare him for his testimony; and (4) defend Dr. Foor's testimony during CareFusion's questioning and be prepared to examine him on his own and Entrotech's behalf.

The very brief time period that CareFusion seeks to force on Dr. Foor and his counsel, as well as Entrotech, and the resulting disruption of Dr. Foor's schedule is unreasonable and improper for the reasons explained herein. Moreover, this is the second unreasonable and improper subpoena directed at Dr. Foor, a non-party, in as many weeks.

BACKGROUND

By way of background, the action underlying this proceeding is a trademark opposition proceeding before the T.T.A.B. of the United States Patent and Trademark Office. Currently, the parties are in trial before the T.T.A.B. Importantly, the rules governing the litigation of T.T.A.B. proceedings sometimes vary from the Federal Rules of Civil Procedure, especially during the

trial phase, when the case before the T.T.A.B. is, essentially, tried on paper. The "testimony deposition" referenced herein is equivalent to the trial testimony of a witness, which is taken by deposition and filed with the T.T.A.B. during a party's testimony period, instead of presented in court before a judge or jury. In comparison, the "discovery deposition" referenced herein is the same type of discovery tool allowed by the Federal Rules of Civil Procedure and regularly used by litigators in civil cases.

On June 17, 2014, CareFusion took almost seven hours of deposition testimony from Dr. Foor, who is a non-party witness. Eight months later, on February 5, 2015, CareFusion listed three witnesses in its pretrial disclosures, along with Dr. Foor, as individuals who "may" testify. Such disclosure, however, does not substitute for issuance of a proper notice of examination under the Trademark Rules of Practice. *See* 37 C.F.R. § 2.123(c). Following these pretrial disclosures, CareFusion's counsel corresponded frequently with Entrotech's counsel in February regarding scheduling the testimony depositions of CareFusion's own three witnesses during its 30-day testimony (or trial) period, which closes March 23, 2015, but never mentioned that it intended to seek Dr. Foor's trial testimony during CareFusion's testimony period. Not until March 3, 2015 did CareFusion mention Dr. Foor affirmatively as a testimony witness for CareFusion's case—and, on that day, CareFusion's counsel e-mailed Entrotech's counsel requesting that it stipulate to CareFusion's submission of Dr. Foor's discovery deposition as evidence, which, absent Entrotech's consent, would not be allowed into evidence under the Trademark Rules of Practice.

Dr. Foor is not a party to the opposition, nor was he an officer, director, managing agent, or person designated to testify under Fed. R. Civ. P. 30(b)(6) or 31(a)(4) at the time of his deposition. 37 C.F.R § 2.120(j) makes clear that the only way his discovery deposition can

offered into evidence is if it is stipulated to by the parties or otherwise approved by the Board. *See Galaxy Metal Gear Inc. v. Direct Access Tech. Inc.,* 91 U.S.P.Q.2d 1859, 1862 (T.T.A.B. 2009) (discovery deposition may be filed by notice of reliance if parties have stipulated to introduction of the deposition). Limited exceptions apply where the witness is dead, unable to testify because if age, illness, infirmity, or imprisonment, or unable to be properly served with a subpoena. None of these exceptions apply to Dr. Foor.

Because Entrotech's counsel never had the opportunity to cross-examine Dr. Foor during his discovery deposition, she declined to stipulate to opposing counsel's request to submit the deposition as evidence and, essentially, have it serve as a testimony deposition that was never subject to a cross-examination. *See* 37 C.F.R. § 2.123(e)(3) ("Every adverse party shall have full opportunity to cross-examine each witness."). Although CareFusion's counsel initially acknowledged the necessity of asking Entrotech's counsel to stipulate to submitting the discovery deposition as evidence, once Entrotech's counsel declined to stipulate, CareFusion then indicated it was going to unilaterally attempt to submit Dr. Foor's discovery deposition into evidence under 37 C.F.R. § 2.120(j). Yet, in the same e-mail, CareFusion's counsel also advised that it would issue a subpoena for Dr. Foor's deposition during CareFusion's testimony period.

On March 5, 2015, CareFusion submitted Dr. Foor's discovery deposition under 37 C.F.R. § 2.120(j) and also improperly issued and served a subpoena for Dr. Foor to appear at a deposition on March 19, 2015, five days before the close of CareFusion's testimony period and ***despite CareFusion being on notice as of March 3, 2015, that Dr. Foor was unavailable in for the remainder of the testimony period due to a booked schedule of administrative appointments, patient visits and procedures, family commitments, and his otherwise demanding schedule as a vascular surgeon***. Notably, for all of the other witnesses, CareFusion

sent testimony notices over three weeks prior, on February 12, 2015. It appears CareFusion assumed, incorrectly, that it could submit Dr. Foor's discovery deposition and have that serve as his testimony—without any cross examination by Entrotech's counsel.

Because the subpoena served on him on March 5, 2015 was unreasonable, unduly burdensome and procedurally defective, Dr. Foor moved to quash it on March 11, 2015. Recognizing the problems with the March 5, 2015 subpoena, CareFusion responded by causing the Clerk of Court to issue a second subpoena, as required by 35 U.S.C. § 24, and having it served on Dr. Foor on March 17, 2015. Nevertheless, this second subpoena is equally defective and unenforceable because it fails to allow reasonable time to comply and is unduly burdensome.

LEGAL STANDARD

Proceedings relating to non-parties subpoenaed in a matter before the T.T.A.B. are within the control of the district court issuing the subpoena. *Luehrmann v. Kwik Kopy Corp*., 2 U.S.P.Q.2d 1303 (T.T.A.B. 1987); *see also* 35 U.S.C. § 24. Since CareFusion's subpoena was issued from the Southern District of Ohio, this Court has jurisdiction to quash it.

While a subpoena for a testimony in the T.T.A.B. under these facts and circumstances is unique, cases holding discovery depositions and subpoenas as unduly burdensome are applicable here because the time in which to respond must be reasonable and cannot unduly burden the deponent. "[T]he issuing court must quash or modify a subpoena that . . . fails to allow a reasonable time to comply . . . or subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(A)(iv); *see also Info–Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 457 (6th Cir. 2008) (quoting *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir. 2007)) ("'[D]istrict courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce.'").

In considering whether the discovery sought is unduly burdensome, the Court considers whether "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, and the importance of the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C)(iii); *Surles*, 474 F.3d at 305 (same). In addition, "the status of a person as a non-party is a factor that weighs against disclosure." *See American Elec. Power Co., Inc. v. U.S.*, 191 F.R.D. 132, 136 (S.D. Ohio 1999); *Vietnam Veterans of Am. v. C.I.A.*, No. 2:11-Civ-16, 2011 WL 4714000, at *5 (S.D. Ohio Oct. 6, 2011) (finding deposition topic overly burdensome where information was available via less burdensome means and information to be gained was of little importance to the resolution of the issues underlying the litigation).

Although the Rule does not specify what is deemed reasonable, "[t]wo business days, more or less, even with the intervening weekend, is not an adequate period of time to comply with a subpoena." *Fox v. Traverse City Area Pub. Schools Bd. of Educ.*, No. 1:07-cv-956, 2009 WL 724001, *1 (W.D. Mich. Mar. 10, 2009); *see also United States v. Phillip Morris Inc.*, 312 F.Supp.2d 27 (D.D.C. 2004) (3 business days notice for busy professionals is not reasonable). Pursuant to Rule 45(d)(3)(A), this Court should quash the second subpoena directed to Dr. Foor for failure to permit reasonable time to comply and failure to reasonably protect a non-party from undue burden.

ARGUMENT

Forcing Dr. Foor to be deposed again during the testimony period is "unreasonably cumulative [and] duplicative[,]" given his professional and administrative commitments and a booked schedule as a vascular surgeon for the remainder of the testimony period. *See* Ex. 3, Decl. of Dr. Foor at ¶¶ 5-6. This is a "burden or expense" that is not outweighed by any benefit to CareFusion. Fed. R. Civ. P. 26(b)(2). Because Dr. Foor is a non-party to the litigation,

CareFusion has a duty to "take reasonable steps to avoid imposing undue burden or expense upon persons subject to [a] subpoena." Fed. R. Civ. P. 45. Although CareFusion's counsel requested that Entrotech's counsel stipulate to allow his testimony into evidence to avoid this situation, CareFusion's efforts are an attempt to correct its missteps in failing to recognize that Dr. Foor's testimony was not automatically admissible through a Notice of Reliance during its testimony period. Had CareFusion acted diligently, it would have known from the very beginning that this discovery deposition would be inadmissible at this stage, and it could have taken steps to treat his discovery deposition as a testimony deposition and avoided this situation entirely.

I. CareFusion's Subpoena of Dr. Foor is Unreasonable.

CareFusion's second subpoena is unreasonable in that it fails to give adequate time for compliance. Fed. R. Civ. P. 45(d)(3)(A)(i) notes that a subpoena to a non-party must allow "reasonable time" for compliance. Decisions in interpreting reasonable time are instructive—"Although the Rule does not specify exactly what a reasonable time is, Rule 45(d)(2)(B) appears to set a presumptive time of 14 days after service to respond." *McClendon v. TelOhio Credit Union, Inc.*, No. 2:05-CV-1160, 2006 WL 2380601, at *2 (S.D. Ohio Aug. 14, 2006) (emphasis added). CareFusion's second subpoena was noticed for exactly 6 days after the service date—and first thing in the morning on the fourth business day after it was served. Accordingly, Dr. Foor has less than one week to schedule and prepare for his deposition. This is plainly unreasonable. *See, e.g.*, *Fox.*, 2009 WL 724001, *1 (W.D. Mich. Mar. 10, 2009) ("Two business days, more or less, even with the intervening weekend, is not an adequate period of time to comply with a subpoena."); *United States v. Phillip Morris Inc.*, 312 F.Supp. 2d 27 (D.D.C. 2004) (3 business days notice for busy professionals is not reasonable); *AngioScore, Inc. v. TriReme Med., Inc.*, No. 12-Civ-03393, 2014 WL 6706898, at *1 (N.D. Cal. Nov. 25, 2014)

(finding subpoena procedurally defective as unreasonable as it required compliance within nine days); *United States v. Woods*, 433, 442 n.3 (E.D. Va. 1996) (obtaining subpoenas seven days before hearing did not allow a reasonable enough time to comply); *In re Stratosphere Corp. Securities Litigation*, 183 F.R.D. 684, 687 (D. Nev. 1999) (subpoena served with six days notice was not reasonable). "While the law permits a litigant to impose herself on other people by calling them as witnesses for the benefit of making her claims, the law implicitly recognizes these people also have lives," and accordingly Rule 45 requires that a subpoena be quashed or modified where it imposes an undue burden. *See Fox*, 2009 WL 724001 at *1.

II. CareFusion's Subpoena of Dr. Foor is Unduly Burdensome.

Forcing Dr. Foor to cancel appointments and commitments booked in advance both risks his reputation as a vascular surgeon and unduly burdens his busy schedule. *See* Ex. 3, Decl. of Dr. Foor, at ¶¶ 5-6. The unreasonableness of CareFusion's request is emphasized by the fact that Dr. Foor was already deposed for almost seven hours over nearly nine months ago, and that no material issues warranting additional testimony have been raised. *See PKF Int'l Corp. v. IBJ Schroder Leasing Corp.*, No. 93-Civ-1816, 1996 WL 591213, at *2 (S.D.N.Y. Oct. 15, 1996) (granting motion to quash subpoenas to the extent they sought second depositions of the same deponents). Moreover, the information sought, as identified in CareFusion's pretrial disclosures, is available from its own witnesses. For example, CareFusion's pretrial disclosures state that Dr. Foor may testify about the recognition of CareFusion's CHLORAPREP brand in the medical/surgical community—a topic that is already being covered by at least CareFusion's own witness, Jan Creidenberg (Marketing Manager), if not its other witness, Jennifer Raeder-Devens, too, as well as documentary evidence it has submitted. Information regarding the few remaining topics identified in connection with Dr. Foor would seemingly be obtained from documents

already introduced into evidence, as well as CareFusion's own witnesses. The need for Dr. Foor's second deposition is far from clear.

CareFusion's counsel could have notified Entrotech's counsel at the time of Dr. Foor's deposition that it intended to use his discovery deposition as testimony. That way, Entrotech's counsel could have cross-examined him, avoiding the unnecessary time and expense of a duplicative deposition and sparing the parties' resources. Such expenses outweigh any marginal benefit that CareFusion could receive by re-deposing the same witness on the same topics. Dr. Foor should not suffer the consequences of the missteps of CareFusion, and Entrotech should not be forced to stipulate to the entry of his previous testimony into evidence without having had the opportunity to exercise its right to cross-examine him.

III. CareFusion Has Not Genuinely Attempted to Avoid Undue Burden and Entrotech Is Not Required to Stipulate to the Admission of Dr. Foor's Discovery Deposition as Testimony to Correct CareFusion's Error.

CareFusion will likely argue that it attempted to avoid placing an undue burden on Dr. Foor by requesting that Entrotech stipulate to the admissibility of Dr. Foor's discovery deposition transcript into evidence under the Trademark Rules of Practice. This argument is misplaced. The T.T.A.B.'s Manual of Procedure makes clear that discovery depositions may only be offered into evidence for a party who, at the time of taking the deposition, was an officer, director, managing agent, or 30(b)(6) witness. 37 C.F.R. § 2.120(j) (emphasis added). Dr. Foor's June 17, 2014 deposition was taken for purposes of fact discovery only; he remains a non-party to the suit because he was not an officer, director, managing agent, or 30(b)(6) designee, and he never held himself out to be in any such position at the time of his deposition. Importantly, Dr. Foor has never held the position of an officer and has never held any title giving him authority to bind Entrotech. Nevertheless, CareFusion improperly submitted Dr. Foor's discovery deposition via a Notice of Reliance under this Rule. Entrotech plans to separately object to the T.T.A.B.

regarding the deposition's admissibility, and will move to strike it in its entirety from CareFusion's affirmative case.

CONCLUSION

For the foregoing reasons, Dr. Foor respectfully requests that this Court quash, or in the alternative modify, the second improper subpoena served by CareFusion.

Respectfully submitted,

/s/ Timothy R. Bricker
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically on March 20, 2015. Notice was sent by operation of the Court's electronic filing system to all counsel who have entered an appearance and any parties who have entered an appearance through counsel. The parties may access this filing through the Court's ECF system.

/s/ Timothy R. Bricker
One of the Attorneys for Dr. John S. Foor, M.D.

617854

EXHIBIT 1

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Ohio

CareFusion 2200, Inc.
Plaintiff
v.
Entrotech Life Sciences, Inc.
Defendant

Civil Action No. TTAB Opposition 91206212

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: John S. Foor, MD

(Name of person to whom this subpoena is directed)

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place:	Date and Time:
Dreitler True LLC 19 East Kossuth Street Columbus, OH 43206	03/19/2015 10:00 am

The deposition will be recorded by this method: stenographic means

❒ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 03/04/2015

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/Mary R. True/
Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* CareFusion 2200, who issues or requests this subpoena, are:

Mary R. True, Dreitler True LLC, 19 East Kossuth, Cols, OH 43206, mtrue@ustrademarklawyer.com, 614-449-6642

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. TTAB Opposition 91206212

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named individual as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action (Page 2)

Civil Action No. TTAB Opposition 91206212

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* John S. Foor M.D.
on *(date)* 3.4.15 .

☒ I served the subpoena by delivering a copy to the named individual as follows:
Receptionst "Sally S." on behalf of John S. Foor M.D.
on *(date)* 3.5.15 ; or

☐ I returned the subpoena unexecuted because:

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
$.

My fees are $ for travel and $ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: 3.5.15

Server's signature

Ron Freeman, Private Process Server
Printed name and title

2400 Indiana Ave. Columbus, OH 43202
Server's address

Additional information regarding attempted service, etc.:

EXHIBIT 2

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Ohio

CareFusion 2200, Inc.
Plaintiff
v.
Entrotech Life Sciences, Inc.
Defendant

Civil Action No. 2:15-mc-00016

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: John S. Foor, MD

(Name of person to whom this subpoena is directed)

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:
See attached: Notice of Testimony Deposition of Dr. John Foor and Opposer's Pretrial Disclosures

Place:	Date and Time:
Dreitler True LLC 19 E. Kossuth St. Columbus, OH 43206	03/23/2015 9:00 am or date ordered by Court

The deposition will be recorded by this method: stenographic means

☐ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 03/17/2015

CLERK OF COURT

Melissa Saddler
Signature of Clerk or Deputy Clerk

OR

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* CareFusion 2200, Inc., who issues or requests this subpoena, are:
Mary R. True, Dreitler True LLC, 19 E. Kossuth, Columbus, OH 43206, mtrue@ustrademarklawyer.com, 614-449-6642

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action (Page 2)

Civil Action No. 2:15-mc-00016

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* John S. Foor, MD
on *(date)* 3.17.15 .

☒ I served the subpoena by delivering a copy to the named individual as follows: served to receptionist "Sally S." (refused to provide last name) on behalf of John S. Foor, MD on *(date)* 3.17.15 ; or

☐ I returned the subpoena unexecuted because: _____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: 3.17.15

Server's signature

Ron Freeman Private Process Server
Printed name and title

2400 Indiana Ave. Columbus, OH 43202
Server's address

Additional information regarding attempted service, etc.:

EXHIIBT 3

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CareFusion 2200, Inc.	)	Case No. 2:15-mc-00016
	)	
Plaintiff,	)	(Pending Before T.T.A.B. In Trademark Opposition No. 91-206,212)
	)	
v.	)	
	)	Judge Edmund A. Sargus
Entrotech Life Sciences, Inc.	)	
	)	Magistrate Judge Norah McCann King
Defendants.	)	
	)	
	)	

DECLARATION OF DR. JOHN S. FOOR, M.D.

I, Dr. John S. Foor, M.D. make the following statements based upon my own personal knowledge:

1. I am over 18 years of age and am competent to make this affidavit.

2. I make this affidavit based upon personal knowledge.

3. I am a vascular surgeon with Mount Carmel Vascular Services St. Ann's in Central Ohio.

4. On March 17, 2015, I was served with a subpoena on behalf of CareFusion 2200, Inc. I have previously been deposed by CareFusion 2200, Inc. on one other occasion for approximately seven hours. The subpoena indicates I am to appear for a second deposition on Monday, March 23, 2015, at Dreitler True LLC, 19 E. Kossuth St., Columbus, OH 43206.

5. I am unavailable on March 23, 2015 due to administrative commitments and family commitments.

6. Due to patient commitments, administrative commitments, and family commitments, including previously scheduled appointments and procedures, I am unavailable for a deposition for the remainder of March.

I declare under penalty of perjury that the foregoing is true and correct.

Date: 3-20-15

Dr. John S. Foor, M.D.

EXHIBIT C

Nancy Ly

Subject: RE: CFN v. Entrotech - Motion to Extent Testimony Period

From: Erin Hickey [mailto:Hickey@fr.com]
Sent: Monday, March 16, 2015 6:42 PM
To: Mary True
Cc: Joseph Dreitler; Tom Trofino; Lisa Martens
Subject: Re: CFN v. Entrotech - Motion to Extent Testimony Period

Hi Mary,

I was just able to discuss this issue with our client. I'm sorry, but they do not want to stipulate to the admission of Dr. Foor's discovery deposition for the reasons I've stated in my e-mail and discussed with you last week.

Please copy Lisa Martens on any e-mails and filings this week, as I'm in Austin for business.

Erin

Sent from my iPhone

On Mar 16, 2015, at 3:26 PM, Mary True <mtrue@ustrademarklawyer.com<mailto:mtrue@ustrademarklawyer.com>> wrote:

Erin -

Attached is the Motion we intend to file (along with my Declaration attaching the exhibits) with the Board tomorrow morning. We will also email a copy to Mr. Pologeorgis and request a telephone conference ASAP. As we discussed, it will not be necessary to file the Motion if you can stipulate to the admission of Dr. Foor's discovery deposition, and we will work with you to facilitate any testimony from Dr. Foor that you would like to take during your testimony period.

Mary

Mary R True
DREITLER TRUE LLC
19 E. KOSSUTH ST
COLUMBUS OH 43206-2001
614.449.6677
614.449.6642(direct)
513.404.5875(cell)
mtrue@ustrademarklawyer.com<mailto:mtrue@ustrademarklawyer.com>

<CFN-Entrotech - Motion to Extend Testimony Period.docx>